IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.68 OF 2003
WITH
CHAMBER SUMMONS NO.192 OF 2004

Miss Shanti Daryanomal Talreja)
An adult, Indian Inhabitant,)
residing at Flat No.22,6th Floor)
Matushree Bhanibai Co-operative)
Housing Society Ltd., Plot No.82)
Survey No.111-D, Ambivali, Near)
RTO Andheri (W), Mumbai-400 053)..PETITIONER

Versus

1.Mr.R.D. Javkar,)
Indian Inhabitant)
250/37, Hendra Building,)
Prarthana Samaj, Vallabhai)
Patel Road, Girgaon,)
Mumbai-400 004)
)
2.Matushree Bhanibai Co-op.)
Housing Society Ltd., A)
Co-operative Housing Society)
registered under Maharashtra)
Co-operative Societies Act,1960)
Plot No.82, Survey No.111-D,)
Ambivali, Near RTO Andheri (W),)
Mumbai-400 053)

3.Smt. S.R. Pawar, Hon'ble Judge)

of Co-operative IVth Court at)

Mumbai having her office at)

Contractor Building, 2nd Floor,)

Ballard Pier, Mumbai-400 039)

)

4.Shri A.V. Nirgude, Hon'ble)

President, Maharashtra State)

Co-operative Appellate Court,)

Mumbai, Old Secretariat, Ground)

Floor, M.G. Road, Mumbai-400 032)..RESPONDENTS

Mr. G.S. Godbole with Mr. G.D. Talreja, for the

Petitioner

Mr. S.Y. Katkade with Ms. Nirmala Gopal for the

Respondent No.1.

CORAM: F.I. REBELLO J.

DATE : 15th October,2004

ORAL JUDGMENT:

. The petitioner was admitted to the membership of respondent No.2, which though served has chosen not to be represented before this Court. As a member on payment of consideration the petitioner was allotted Flat No.22. It is her case that she was admitted as a member in place of one Pednekar. The respondent No.1 raised a dispute before the Co-operative Court. It

was his contention that he was a member of the respondent No.2. He had paid substantial contribution for the purpose of purchase of a flat and the flat No.22 admeasuring 460 sq.ft. on the 6th floor was allotted to him. It was his case that he had been expelled from membership by the respondent No.2 without following the due procedure. The dispute was initially filed against the respondent No.2 alone on 25th January, 1995. The respondent No.1 thereafter added one Mrs. Surekha Prahalad Akre as opponent No.2. The grievance therein was that in his place Surekha P. Akre had been admitted as a member. A second amendment came to be made wherein the present petitioner came to be added as an opponent and consequently the amendments were also made. Surekha P. Akre initially filed reply some time in January, 1997 setting out that flat No.22 was allotted to her by respondent No.2 herein. She thereafter filed another application on 30th April, 1997 setting out therein that she is allotted flat No.17 by allotment on 5th October, 1994 and she was also issued share certificate. This reply came to be filed in the Review Application. The respondent No.2 filed written statement wherein in paragraph 4 which was in answer to paragraph 5 of the claim statement of respondent No.1. The respondent No.2 admitted that Flat No.22 was allotted to respondent No.1, but it was only tentative. Surekha P. Akre vide application dated 2nd May, 1997 prayed that her name be deleted as she was not involved to the dispute in respect of flat

No.22. The petitioner herein filed her written statement setting out therein that the respondent No.3 herein had admitted her as a member on 4th October, 1993 and had issued share certificate. It was explained that the share certificates were initially allotted to one N.D. Pednekar which were transferred to the petitioner on 4th October, 1993. She also set out that she was staying in Flat No.22 and had paid construction charges amounting to Rs.1,14,980/- as also taxes therein. She denied that flat NO.22 was allotted to respondent No.1 or that he was entitled to the same.

. The application by Surekha was considered and by order dated 19th March, 1998 her name was deleted. This was not challenged by any party including the petitioner before this court. Thereafter by award dated 17th April, 2002 the dispute filed by the respondent No.1 was allowed. The petitioner was ordered to quit, vacate and hand over possession of flat No.22 to the respondent No.1 within 3 months and there are other consequential reliefs. The respondent No.1 was directed to pay remaining construction costs of Rs.1,65,000/- with 12% interest from the date of filing of the dispute to the society within 3 months.

2. The petitioner being aggrieved preferred an Appeal which was numbered as Appeal No.81 of 2002. The Appellate Court also noted that the respondent No.2 admitted that respondent No.1 had made some

payments. The last such payment being in the year 1983. The order of the Co-operative Court was upheld considering the failure by the respondent No.2 in following the principles of natural justice as also the requirements of law It is these orders which are the subject matter of challenge in this Petition.

3. At the hearing of this petition on behalf of the petitioner their learned Counsel contends as under:-

(1) The dispute as raised by respondent No.1 without joining Surekha P. Akre was not maintainable. It is the contention of the petitioner that it was Surekha P. Akre who had been admitted in place of Respondent No.1, whereas the petitioner had been inducted as claiming rights through one Pednekar.

(2) It is then submitted that on facts and circumstances it really could not be said that the expulsion of respondent No.1 was not legal and in these circumstances no order could have been passed against the petitioner herein.

(3) It is lastly submitted that the reliefs as prayed for are in the nature of specific performance of a contract. The Courts below before granting the relief even if they had come to the conclusion that the respondent NO.1 was not lawfully expelled could not have granted relief against the petitioner who was

bonafidely inducted into the premises having paid due consideration.

. On the other hand on behalf of the respondent No.1 his learned Counsel contends that the petitioner cannot now contend that the orders are liable to be set aside on the ground that Smt. Surekha Akre was not a party. It is submitted that Surekha Akre was a party. Surekha Akre applied for being dropped as a party. That application was allowed. The petitioner herein did not protest. In the appeal filed also the petitioner did not raise a ground of non-joinder of Surekha P. Akre and in these circumstances it is not open to the petitioner for the first time before this Court to raise the plea of non-joinder of Shrekha Akre before the Registrar for the first time before this Court in a Petition seeking exercise of its extra ordinary jurisdiction. In so far as expulsion of concerned, it is pointed out that apart from failure to comply with the principles of natural justice and fair play there has been statutory non-compliance by the respondent No.1 and in these circumstances the petitioner cannot complain that the expulsion was illegal. Lastly, it is submitted that the respondent No.2 has admitted that the respondent No.1 as a member. Their Lawyer served a notice on the respondent No.2 which the respondent NO.2 accepted the respondent No.1 as a member. There is an admission in the reply filed that the respondent No.1 had paid the amount of Rs.40,000/-. If at all the respondent No.1

had not paid the balance amount it was because the respondent No.2 did not call on the respondent NO.1 to pay the said amount which otherwise the respondent No.1 was willing to pay. At any rate it is submitted that having accepted that Flat No.22 was allotted to respondent No.1 and the same flat is allotted now to petitioner as a consequence of setting aside the order of expulsion the respondent No.1 will have to be put back in the same position as a member entitled to flat No.22. It is, therefore, submitted that this Court ought not to interfere with the findings of fact and the reliefs granted by the Courts below.

4. The matter was adjourned and heard on several days. Attempts were also made to see if the matter could be amicably resolved. It was however, not possible to do so. At the hearing on behalf of the petitioner their learned Counsel sought to produce the documents to show that it is Surekha Akre who was admitted as a member in place of the respondent No.1. This plea of the petitioner was rejected as it is not the case of the petitioner that she was not properly represented and, therefore, unable to produce the documents which are sought to be produced. These are also not documents which have subsequently came into existence and/or which were not available to the petitioner when the dispute was pending or have been now discovered. In these circumstances to my mind it would not be proper at this stage after having allowed Surekha Akre's name to be deleted from the proceedings

to once again to reenlarge the scope of enquiry by allowing the said documents. That plea is, therefore, rejected.

5. Having said so the 1st question that will have to be decided is whether the respondent No.1 was allotted Flat No.22. To my mind apart from the findings of facts there can be no dispute on that count. We firstly have letter dated 1st September, 1994, wherein on behalf of the society their learned Counsel had admitted that Flat No.22 had been allotted to Respondent No.1. In the written statement filed by respondent No.2 in paragraph 4 they admitted once again allotment of flat No.22, but sought to set out that it was only tentative. In paragraph 8 of the written statement it is set out that allotment of flat No.22 was cancelled. There is no dispute, therefore, that the flat No.22 was allotted to the respondent No.1. The only dispute remained is whether that allotment was tentative. The society, respondent No.2, which has raised the plea, chose not to lead evidence. Apart from that not only was there an allotment but the respondent No.1 herein was able to show that he had paid to respondent No.2 a a sum of Rs.40,309/- as part payment towards the cost of construction. Respondent NO.1 has been able to establish and the Courts below have rightly held that Flat No.22 was allotted to the respondent No.1.

6. Dealing with the second contention of

expulsion from membership it would be clear on the findings of fact recorded that respondent No.1 was expelled without following due procedure though this was sought to be contested on behalf of the petitioner. Nevertheless the fact remains that the expulsion was not approved by the Registrar as required under the provisions of the Act. Once there was no approval from the Registrar the expulsion would be of no consequence and the respondent No.1 would continue to be a member. That contention must also be rejected.

7. The last contention is whether the relief as granted could have been granted in favour of the respondent No.1. The respondent No.1 was legally and lawfully admitted as member. He was allotted flat NO.22. He has paid a sum of Rs.40,000/- and odd. The balance amount was not paid as it was his contention that he was not so informed. In other words in so far as the respondent No.2 is concerned the respondent NO.1 has done whatever legally he had to do. It is no doubt true that the petitioner is now in possession of the premises and has been there for nearly eight years. The petitioner has also paid the amount as demanded by the respondent No.2. The question is whether on account of that the petitioner should be denied the relief. To my mind the respondent No.1 has done nothing which would disentitle him to the relief as granted. In these circumstances merely because the hardship would be occasioned to the petitioner cannot

be a ground for refusing the relief to the respondent No.1 herein. In my opinion therefore, it would not be possible to interfere with the reliefs as granted by the Courts below.

8. It was lastly submitted that as now the petitioner would be denied possession of the flat the Courts below have also not granted as an equitable consideration, refund of the amounts taken from the petitioner. In my opinion ends of justice would be met if the respondent No.2 is directed to refund to the petitioner the amount paid by her towards the cost of the flat. Considering that the Courts below had directed payment of interest at 12% per annum by petitioner to respondent NO.2 it would be in the fitness of things that the respondent No.2 is directed to pay to the petitioner that amount with interest at the rate of 12% per annum from the date of payment till the amount is paid to the petitioner.

9. It may be mentioned that the petitioner has also taken out Chamber Summons being Chamber Summons NO.192 of 2004 to amend the petition in so far as Surekha P. Akre. For the reasons already stated in the judgment this will not be a fit case to allow the Chamber Summons. Hence, Chamber summons rejected.

10. For all the aforesaid reasons petition disposed of in terms aforesaid with the direction as set out in paragraph 8. There shall be no order as to

costs.

11. Learned Counsel for the petitioner seeks stay of the order of eviction of the petitioner for a period of eight weeks. Considering that the petitioner is in possession of the flat the petitioner not to be evicted for a period of eight weeks from today.

12. It will be open to the petitioner to take such steps for recovery of any additional money paid by the petitioner to the society according to law. However, that question was not in issue in this petition and neither has been considered or answered.

. Parties/Authorities to act on an ordinary copy of this order duly authenticated by the Associate/Personal Secretary of this Court.

(F.I.REBELLO, J.)